

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JERRY MCGUIRK)	
Claimant)	
VS.)	
)	
ACME FOUNDRY)	Docket No. 250,361
Respondent)	
Self-Insured)	

ORDER

Claimant appeals the July 15, 2002 Award of Administrative Law Judge Jon L. Frobish. Claimant was denied benefits after the Administrative Law Judge determined that claimant failed to prove accidental injury arising out of and in the course of his employment with respondent. The Appeals Board (Board) held oral argument on January 7, 2003.

APPEARANCES

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent appeared by its attorney, Paul M. Kritz of Coffeyville, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. The parties confirmed at oral argument that Raul Huet, M.D., whose deposition was taken on January 8, 2002, is also identified in the record as Ralph Hewitt, M.D. The parties acknowledged that Dr. Huet and Dr. Hewitt are one and the same person.

ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds the Award of the Administrative Law Judge denying claimant benefits for having failed to prove accidental injury arising out of and in the course of his employment should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own as if fully set forth herein.

Claimant, a long-term employee of respondent, testified that he began developing breathing problems in September 1998. He went to his family physician, Stanley W. Haag, M.D., and was diagnosed with pulmonary fibrosis, chronic obstructive pulmonary disease (COPD), secondary panic or anxiety disorders, Parkinson's disease and carpal tunnel syndrome. Dr. Haag treated claimant through February 18, 2002. At that time, Dr. Haag stated claimant's COPD was stable.

Dr. Haag referred claimant to Joel S. Sabangan, M.D., an internal medicine doctor specializing in pulmonology and lung conditions. Dr. Sabangan first saw claimant on December 10, 1998. Claimant's pulmonary function tests, x-rays, EKGs and treadmill tests were all reported as normal. Claimant advised Dr. Sabangan that he had emphysema and bronchitis, but Dr. Sabangan's tests failed to verify either of those conditions. Dr. Sabangan was able to identify only mild restrictions from claimant's pulmonary tests involving pulmonary fibrosis. He stated that there were several causes of pulmonary fibrosis, including collagen, vascular diseases, drugs, severe inflammatory infections, lung diseases and a large group which he identified as "idiopathic." Dr. Sabangan was unable to make any determination as to whether claimant's lung problems were related to his employment. He last saw claimant on January 14, 1999. He had additional treatments scheduled with claimant, but claimant never returned. He was unable medically to explain claimant's breathing attacks.

Claimant was referred by his Social Security attorney to David G. Paff, M.D., an occupational medicine specialist, on March 24, 1999. Pulmonary tests performed in December 1998 indicated mild restrictions. Dr. Paff stated that in his opinion, his examination of claimant was basically normal. He advised that while claimant stated he was exposed to certain elements in the workplace, it was not clear as to what those elements were or what the exposure levels were. He stated that claimant had a tendency to hyperventilate, which he described as overbreathing with anxiety and asthma. He found no evidence of restrictive diseases, although he acknowledged on previous pulmonary tests there may have been some indication of that. The doctor described the pulmonary function test performed on claimant as normal. Dr. Paff was unable to link claimant's condition to respondent's workplace. He testified claimant's anxiety attacks and

hyperventilation were not related to claimant's employment. He did diagnose mild asthma, which he stated could possibly be related to claimant's work, but stated "I just don't think it is a very strong possibility."

The Board, in considering the medical evidence, finds the opinion of Dr. Sabangan to be the most credible. Dr. Sabangan was unable to state within a reasonable degree of medical probability that claimant suffered from any medical conditions associated with his work.

The Board questions the opinion of Dr. Haag, claimant's medical family practitioner, as the information provided to Dr. Haag, at times, appeared less than accurate. Claimant advised Dr. Haag on January 7, 1999, that he was having difficulty breathing due to trouble associated with the fumes at work. It is noted in the record that claimant's last day of employment was December 28, 1998. Again, on January 11, 1999, claimant advised Dr. Haag that he was having difficulty with shortness of breath, both at home and at work. Again, this is after claimant's last day of work with respondent.

On cross-examination, Dr. Haag was asked to describe the type of chemicals to which claimant was exposed at work and was unable to do so. He was unable to identify the density, the quality or the length of exposure to any chemicals connected with claimant's employment with respondent.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹ The ultimate conclusion appears to have been provided by claimant's family practitioner, Dr. Haag, when he stated:

. . . we're never going to have a perfect link between what did this and what agent did this because I don't know what's in that foundry; but I can guarantee you that something could have done this.

. . . .

But I'm not saying that it did.²

The Board finds that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent and the Award of the Administrative Law Judge denying claimant benefits should be affirmed.

¹ See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

² Haag Depo. at 62.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated July 15, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Paul M. Kritz, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation